IN THE

Supreme Court of the United States

76-1831

OCTOBER TERM 1976

JEROLD MASSLER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, JEROLD MASSLER, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming the judgment of conviction of violation of the Federal Narcotics Laws entered in the United States District Court for the Middle District of Florida.

OPINION BELOW

The opinion of the Court of Appeals, decided on April 20, 1977, has not yet been officially reported and is set forth in the Appendix as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1977 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioner's right to due process of law was violated when the Court denied Petitioner's motion for a hearing to determine whether a pre-indictment delay of three years and six months was for the purpose of gaining a tactical advantage over him?

2. Whether Petitioner's right to due process of law was violated, when the Court denied petitioner's motion to dismiss the Indictment, although a pre-indictment delay of three years and six months without any indication whatever that he was even being investigated resulted in substantial prejudice to Petitioner as he was no longer able to recollect events surrounding unspecified days some three and one half years before.

3. Whether the Court erred in denying the Petitioner's motion for a hearing to determine whether the government's delay was a deliberate tactical maneuver, because the Court erroneously assumed that a showing of substantial prejudice and deliberate tactical delay was a prerequisite for a due process violation when in fact deliberate tactical delay alone can be sufficient.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FIFTH AMENDMENT:

> "No person shall be . . . deprived of life, liberty, or property without due process of law"

STATEMENT OF THE CASE

JEROLD MASSLER, together with a number of other defendants, was indicted in the Middle District of Florida, Tampa Division, on October 10, 1975. He was charged in a

one-count indictment alleging a conspiracy to violate 21 U.S.C. 952(a) and 841(a)(1) by importing marijuana with intent to possess and distribute, in violation of Section 963 and 846, Title 21, U.S.C.

The trial against the petitioner and other defendants commenced on March 1, 1976 before a jury, and on March 12, the jury found all of the defendants guilty. Petitioner Massler was sentenced to two and one-half years imprisonment.

Petitioner appealed to the Court of Appeals for the Fifth Circuit. The appeal was denied. A motion for rehearing was denied on May 24, 1977.

When JEROLD MASSLER was indicted in October of 1975, three years and six months had elapsed from the date when he was alleged to have committed the overt acts specified in the indictment. Although certain that he did not commit the acts alleged, petitioner Massler was unable to recollect his whereabouts on "unspecified" days some three and one half years earlier. All of his efforts to revive his memory proved unsuccessful.

Prior to trial, Petitioner Massler moved for a Bill of Particulars and Discovery, in the hope of gathering information that would enable him to remember and to formulate his defense. These motions were denied without hearings or argument. MASSLER also moved to make the only witness against him, one WILLIAM KILGORE, available for interviewing. (T669). The Government made the witness available, but he refused to respond to any of defense counsel's questions. Defense counsel requested the court to instruct the witness to confer with counsel; but the court denied the request. During the trial the request was renewed, but again denied. (T302-305).

Unable to recollect and without any realistic prospect of remembering prior to or at trial, petitioner moved for a dismissal of the indictment. In the alternative, he asked for

a hearing to determine whether the three and one half year delay violated his due process rights on the ground that the delay was deliberately done to gain a tactical advantage over him. He asserted that such a tactical advantage was indeed gained, as he was disabled from remembering facts that could have substantiated his plea of innocence. The Court waited until one week before trial, February 24, 1976, and denied the motions.

During trial, facts were elicited that indicated a significant chance of deliberate delay by the prosecution. The testimony indicated that the investigation was initiated by the State of Florida in 1972 (T1263, T1293). In addition, the chief witness, KILGORE, was cooperating with the government soon after his 1972 arrest for possession of heroin. Nevertheless, the indictment against JEROLD MASSLER was not handed down until October 10, 1975.

At trial, the government's case was chiefly predicated on the testimony of WILLIAM RAND KILGORE. He alleged that there existed a conspiracy among the defendants to import marijuana from Columbia, South America into the United States and then to distribute the marijuana in the United States. KILGORE testified that he "joined" the conspiracy on or about January 1972 when defendant ALVAREZ employed him to act as a distributor and guard at a so-called "stash house" located in the Tampa Bay area (T149-150). Most of his contacts were with defendant ALVAREZ in Florida, under whose supervision he worked. At ALVAREZ' request, KILGORE also worked with defendants WELLS and RICE and allegedly flew with them to Columbia, South America to purchase marijuana.

KILGORE also claimed to have met JEROLD MASSLER on a few occasions. He claimed that MASSLER gave him money in exchange for marijuana in New York in March of 1972; that in April of 1972, he allegedly went to New York to meet with MR. MASSLER to pick up money.

which in fact he never did (T554), and that later he saw defendant MASSLER give money to defendant ALVAREZ (T596).

This testimony by KILGORE was really the only evidence against JEROLD MASSLER. As the testimony was unsubstantiated by any other source KILGORE'S credibility was the key issue in the case.

It was brought out that KILGORE had been a user and smuggler of both heroin and cocaine. Defense counsel then elicited some other facts very pertinent to the credibility issue but was denied the opportunity to develop them, either because of Court rulings or the impossibility of doing so as a result of the long delay. Thus, although KILGORE testified that he had stopped using heroin in 1972 (T941-950) defense counsel was denied the opportunity to develop the facts surrounding his arrest for heroin possession in April of 1972 (T941-950). Although KILGORE was given "informal immunity" and had been in protective custody and supported by the government from October 1975 until the commencement of the trial, the defendants were prohibited from going into the circumstances of KILGORE'S five month protective custody. (T1037). More importantly, KILGORE had testified that he had made various flights for defendant ALVAREZ with defendants WELLS and RICE to pick up marijuana. Yet it was brought out that records of airline charters for the year 1972 had been routinely destroyed. (T1986 and T1921). These records might have successfully impeached KILGORE'S credibility with regard to the purpose or actuality of the ALVAREZ charters to South America.

Defense counsel's constrained effort to show the unreliability of the witness was unsuccessful. On March 12, 1976 the jury returned a verdict of guilty against JEROLD MASSLER.

REASONS FOR GRANTING A HEARING

POINT I

PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHEN THE COURT DENIED PETITIONER'S MOTION FOR A HEARING TO DETERMINE WHETHER A PRE-INDICTMENT DELAY OF THREE YEARS AND SIX MONTHS WAS FOR THE PURPOSE OF GAINING A TACTICAL ADVANTAGE OVER HIM.

This case presents certain issues that are being presented to this Court for the first time.

In *United States v. Marion*, 404 U.S. 307 (1971), the Supreme Court set forth the test that the defendant must meet in order to prevail upon a claim that pre-indictment delay violated his right to due process. A complainant must show that the delay was caused by the government in order to gain a deliberate tactical advantage over the defendant and (or)* that the delay in fact resulted in actual prejudice to the defendant, Id. 324. The Court, however, declined to elaborate upon the kind of showing that the defendant must make to cause a dismissal of the prosecution on due process grounds.

> Actual prejudice to the defendant of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay caused detriment to a defendant's case should abort a criminal prosecution. To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a *delicate judgment* based on the *circumstances in each case.*

* See Point III, pg. 19.

(emphasis added) *Marion v. United States* 404 U.S. at 324. In so stating the Supreme Court has left to the lower courts the task of engaging in this delicate balancing judgment based upon the facts existing in individual cases. In the instant case Jerold Massler was denied due process of law when, after a pre-indictment delay of three years and six months, his motion to review whether or not there was deliberate tactical delay by the government was summarily denied and no evidentiary hearing was held.

Jerold Massler, in order to prevail upon his motion that due process of law was denied him, must show that the delay was an intentional device to gain a tactical advantage over him. To show this, Mr. Massler is obliged to articulate specific facts and circumstances that give rise to the reasonable inference of deliberate prosecutorial misbehavior. Without recourse to a hearing, this requirement places upon the defendant an almost superhuman burden.

The practical realities of this situation dictate that even when, as here, there seems to be deliberate prosecutorial misconduct, the defendant has absolutely no way of proving it. The Court cannot accept the image created by television and movies of defense investigators sifting through tantalizing clues, that are ultimately assimilated by the defense attorney into an irrebutable explanation of what actually transpired. This image is pure illusion. Even neutral facts relating to the underlying charge are frequently undiscoverable by the defendant for a multitude of reasons. Certainly, information which is under the exclusive control of the prosecution, information which the prosecution would frequently be desirous of covering up, will never be examined by a defendant unless the prosecution happens to voluntarily turn it over, or the court compells the prosecution to do so.

As a rule, defendants are not as capable of documenting

prosecutorial delay as Mr. Lovasco of *United States v. Lovasco*, ———U.S.———, 45 U.S.L.W. *4627* (June 9, 1977). There the defendant was able to present a postal inspector's report on his investigation that was prepared one month after the crimes were allegedly committed, as well as a stipulation the United States Attorney entered indicating that little information concerning the crime was uncovered in the seventeen months following the preparation of the postal inspectors report. Id. at 4628. Even though such a situation may occasionally arise, its infrequency dictates that it should not constitute the basis for the Court's formulation of rules governing pre-indictment delay. The fact of the matter is that the predominant situation is to the contrary, that is, in the majority of cases defendants are functionally foreclosed from proving deliberate tactical delay solely because they are being denied the information which would enable them to prove such claims Justice Marshall's concluding remarks in *Lovasco* are enlightening as to this point: "Indeed in the intervening years so few defendants have established that they were prejudiced by delay, that neither this court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay." Id. at 4631. This statement substantiates not that defendants have not been prejudiced by deliberate tactical delay, but that there has been unavailable to defendants sufficient means to substantiate their claims. Unless defendant Massler and other defendants like him are provided with the opportunity to elicit pertinent facts from the government which will either subssantiate or rebut their claims, the Due Process rights of defendants asserting tactical delay will continue to eviscerate until they reach the point of nonexistence.

In demanding such a hearing defendant Massler is mindful of the fact that there are those who envision such a procedure as too much of an administrative burden for the

prosecutors as well as the courts. However, it is not in every situation where the court should hold a preliminary hearing. It is only in those cases where, even though the indictment was within the relevant statue of limitations, the time that has elapsed between the commission of the offense and the indictment is so long as to raise the question of "what took so long"? While defendant Massler cannot say that in each and every case any specific time period within the statute of limitations is enough to mandate such a hearing, here, where a delay of three years and six months occurred, the delay, in and of itself (coupled with the defendant's claim of due process denial) should necessitate the holding of an evidentiary hearing.

Nor should this Court be concerned that too much of a burden will be placed upon prosecutors. Good prosecutors already catalogue in their files the various stages of an investigation as they develop. Petitioner Massler is not asserting that the constitution requires that prosecutors do anything more than what good office practice dictates. The fact that it is easier not to keep records than it is to keep records is hardly a valid reason to indorse the slothful procedure. This Court cannot condone such a procedure especially in light of the fact that it leads to an abridgment of the defendant's due process rights. Nor will the keeping of such records add considerably to the work-load of the courts. If such records are kept properly, the courts examination of such records can be efficiently managed.

The purpose of the hearing is simply to answer the question of whether the long delay was reasonable under the circumstances. However, just as Petitioner Massler's claim of purposeful delay is insufficient to require a dismissal of the indictment, similarly the prosecutors' bald assertion that there was no tactical delay should be insufficient to terminate the inquiry. As the Supreme Court has said when talking of the Fourth Amendment Warrant requirement:

> "It's protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of just being judged by the officer engaged in the often competitive enterprise of feretting out crime."

Johnson v. United States, 333 U.S. 10, (1948) Defendants such as Jerold Massler can only be protected when they claim deliberate pre-indictment delay, if the issue of tactical delay is decided by a neutral and detached magistrate instead of being judged by the prosecutor himself, engaged in the often competitive enterprise of getting convictions. It is the judge and not the prosecutor who should decide, must decide, whether the prosecutor did anything wrong.

Of course, this is not to say that the "due process clause permits courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment." *United States v. Lovasco*, Id. at 4628. It is to say that due process mandates that courts meaningfully determine whether there was tactical delay which violates those "fundamental conceptions of justice which lay at the base of our civil and political institutions", *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) and which define "the communities sense of fair play and decency," *Rochin v. California*, 342 U.S. 165, 173 (1952).

Petitioner Massler asks for a "fair" hearing. He does not contend that such a hearing must conform to the full blown procedures of a criminal trial. He does not contend that he is entitled to see the government's case in its entirety. Due process is flexible enough to allow for different procedures in order to accommodate the different interests that are being protected. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

However, at the very least, the prosecutor should be required to allow petitioner Massler and the court to

examine those papers that are relevant to the evolution of the investigation. If such papers contain information that the petitioner has no right to see, the papers should be redacted so only the relevant portion is turned over. If redaction is impossible under the circumstances, an *in camera* inspection by the court becomes the only acceptable alternative.

The prosecutor can put forth many reasons which would justify the delay. These reasons would be sufficient to deny the defendant's claim if the judge determines that these reasons in fact exist on the basis of the evidence before him. Professor Amsterdam has catalogued some of the reasons for delay which would probably justify the delay:

> "Proof of the offense may depend upon the testimony of an undercover informer who maintains his "cover" for a period of time before surfacing to file charges against one or more persons with whom he has dealt while disguised . . . If there is more than one possible charge against a suspect, some of them may be held back pending the disposition of others in order to avoid the burden upon the prosecutor's office of handling charges that may turn out to be unnecessary to obtain the degree of punishment that the prosecutor seeks . . . Offenses may not be immediately reported; investigation may not immediately identify the offender; an identified offender may not be immediately apprehendable . . . An indictment may be delayed for weeks or even months until the impaneling of the next grant jury."
>
> ———U.S.———, 45 U.S.L.W. 4627, 4631 fn. 19.

These and other reasons might constitute valid justifications. However, the abstract existence of innumerable possible justifications does not establish that in

any particular case any one of these possible reasons was in fact the determining one. The theoretical existence of these possible justifications does not exclude the fact that the government was motivated by a more sinister and illegitimate motive in postponing the indictment of Jerold Massler.

Even if this Court should find that the three and one half year delay in and of itself did not entitle Jerold Massler to a *pre-trial* hearing on the issue of deliberate tactical delay, certainly such a hearing was mandated after the revelation of significant facts at trial. In *Marion* the Court stated that "events at trial may demonstrate actual prejudice but at the present time appellees' due process claims are speculative and premature." 404 U.S. 307, 326 (1971). In the instant case sufficient facts were revealed at trial to warrant a *post-trial* inquiry on the issue of delay even if petitioner Massler's claim was speculative and premature *prior to trial.*

The evidence at trial showed that the prosecution against Jerold Massler was initiated by the State of Florida in 1972 (T1263). It revealed that the investigation was carried out by law enforcement officers Jahnke and Williams for the State of Florida (T1293). Furthermore, evidence showed that Kilgore was cooperating with the government after his 1972 arrest (T28). A three and one half year delay supplemented by evidence that the government had commenced its investigation almost three and one half years prior to the indictment and that its chief witness was already working for the government at that time raises a sufficient inference that the delay was to gain a tactical advantage. We implore this Court to order an evidentiary hearing to explore this issue.

POINT II

PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED. WHEN THE COURT DENIED PETITIONER'S MOTION TO DISMISS THE INDICTMENT, ALTHOUGH A PRE-INDICTMENT DELAY OF THREE YEARS AND SIX MONTHS WITHOUT ANY INDICATION WHATEVER THAT HE WAS EVEN BEING INVESTIGATED, RESULTED IN SUBSTANTIAL PREJUDICE TO PETITIONER AS HE WAS NO LONGER ABLE TO RECOLLECT EVENTS SURROUNDING UNSPECIFIED DAYS SOME THREE AND ONE HALF YEARS BEFORE.

In *United States v. Marion*, 404 U.S. 307 (1971), the Supreme Court held that the speedy trial clause of the Sixth Amendment is inapplicable to the issue of pre-indictment delay as it is "a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge . . . that engage the particular protections that the Sixth Amendment was designed to protect." Id. at 320. The Court went on to say that although the primary safeguard against the bringing of overly stale criminal charges is the legislatively enacted statute of limitations, this does not end the inquiry. Even if an action falls within the applicable statute of limitations, there is only a rebuttable presumption that the cause is timely. The presumption is rebutted by a showing that the pre-indictment delay violated the defendant's Fifth Amendment right to due process of law. JEROLD MASSLER was denied due process of law when, as a result of prosecutorial delay, he was deprived of the ability to recollect facts and thereby adequately defend himself against the charge that was leveled against him.

JEROLD MASSLER along with a number of other

defendants was indicted in the Middle District of Florida, Tampa Division on October 10, 1975. He was charged in a one count indictment with conspiracy to violate 21 USC 1052 (A) and 841(A)(1) by importing marijuana from Colombia, South America into the United States with intent to possess and distribute the marijuana, in violation of section 963 and 846, of title 21 of the United States Code. Only two overt acts were charged against JEROLD MASSLER. The first alleged that on or about March, 1972 PEDRO ALVAREZ traveled to New York and met with JEROLD MASSLER. The second alleged that JEROLD MASSLER paid approximately one hundred thousand dollars to PEDRO ALVAREZ on or about April, 1972 in Tampa, Florida.

When the indictment was handed down in October of 1975 JEROLD MASSLER was unable to recollect his whereabouts, his activities, his possible companions on unspecified days some three and one half years earlier. There was no documentary evidence that would in any way cast light upon the events of those days. Moreover, the government indicated that there were no wiretaps or consensual recordings. MR. MASSLER contacted all of the people he knew who might be able to remember, or assit him in remembering. Unfortunately, JEROLD MASSLER'S efforts to pin point his whereabouts, activities, and associates on the days of the alleged overt acts proved unavailing. Nor could his attorney assist him in remembering as the attorney had no personal, first hand knowledge of the facts alleged. MR. MASSLER'S defense attorney attempted to tap the only possible source of information—the witness KILGORE who claimed to have been in the company of JEROLD MASSLER three and one half years before. A motion was filed by the defense attorney on February 26, 1976 to make KILGORE available to the defense for an interview. The motion was granted and the witness was interviewed by the defense counsel, but

the witness refused to answer any questions concerning the matters about which he was to testify in the case. The witness stated "I don't have anything to say to you" (T669). After the pre-trial attempt at an interview, the defense counsel made a motion to instruct the witness to confer with counsel. This request was denied. During the trial defense counsel again requested and was given the opportunity out of the presence of the jury to question KILGORE. Again the witness refused and the defense counsel requested that the court instruct the witness to discuss the matter. The judge refused to order the witness to confer with counsel (P302-305).

As a result of these unsuccessful efforts to trigger petitioner MASSLER'S recollection, JEROLD MASSLER was completely in the dark in the months prior to the trial about the charge that the government had brought against him. MR. MASSLER'S only hope was that something in the government's case would trigger his recollection at the time of trial. Events at trial did not trigger his recollection. Yet according to JEROLD MASSLER, the testimony given by the witness KILGORE was a fabrication.

It is clear that the still unjustified delay of three and one half years placed petitioner MASSLER in an impossible position impairing the fact finding process at trial.

> It is monstrous to put a man on trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be able to bring forward his servants and family to say where he was and what he was about at that time; but if the charge not be preferred for a year or more, how can he clear himself? *No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial.*

(emphasis added) *Queen v. Robbin*, 1 Cox Crim Cas 114,

116 (SOMERSET WINTER ASSIZES 1844).

Moreover, the prejudice experienced by JEROLD MASSLER was exacerbated by the fact that during the intervening years between the alleged commission of the offense and the indictment, absolutely no notice whatsoever, either constructive or actual, was given to the petitioner as to the charge against him. Yet during this period of time the government was actively preparing its case. As stated by Judge Wright in his concurring opinion in *Nickens v. United States*, 323 F.2d. 808, 813 (D.C. Cir. 1963):

> Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors.

Id. at 813.

The fact that no notice at all was given to JEROLD MASSLER in the pre-indictment years [illegible]rs his case clearly distinguishable from *United States v. Marion*, 404 U.S. 307 (1971). While in *Marion* there was a three year delay between the commission of the offense and the date of the indictment, the defendants had knowledge of the ongoing investigation prior to the handing down of the indictment. A summary of the relevant chronology in that case is illuminating. Between March 15, 1965 and

February 6, 1967 the defendants operated a business of Allied Enterprise, Inc. On February 6, 1967, the Federal Trade Commission entered a cease and desist order against them. In September and October, 1967, the Washington Post carried a series of articles which mentioned that the defendants were under investigation by the United States Attorney. Between the summer of 1968 and January, 1969, the defendant-appellants delivered their business records to the United States Attorney. Finally, on April 21, 1970 the indictment was returned.

It is all too obvious that the defendants in the *Marion* case were very much aware of the pending investigation. They were put on actual notice from a variety of sources that there was a substantial likelihood that they would be obliged to explain their business conduct as Allied Enterprise. Moreover, the subject matter of the case involved documentary evidence that could meaningfully trigger their recollections. Such notice to the defendants in 1967 rendered tenuous their claim of forgetfulness in 1970.

JEROLD MASSLER was not the subject of a cease and desist order, nor of any newspaper articles. He did not participate in any pre-indictment investigation. There was unavailable to him any documentary evidence that could refresh his memory. Rather than be given three years to remember, as in *Marion*, JEROLD MASSLER was given three years to forget.

It is predictable that JEROLD MASSLER would be incapacitated in 1976 from remembering with any particularity "unspecified" days in a conspiracy indictment that pertains to three years before. Moreover,

> . . . in a very real sense, the extent to which he was prejudiced by the government's delay is evidenced by the difficulty he encounters in establishing with particularity the elements of that prejudice.

United States v. Ross, 349 F.2d 210, 215 (D.C. 1965). In a

situation such as this one, the inherent common sense likelihood of a memory lapse after such a delay must serve as sufficient substantiation for JEROLD MASSLER'S claim. To demand that he show specifically what he cannot remember would be to demand the impossible, as the

> defendant's failure of memory, this inability to reconstruct what he did not remember, virtually precludes his showing in what respects his defense might have been more successful if the delay had been shortened.

Id. at 215.

Finally, it must be pointed out that the petitioner does not assert that due process demands dismissal of the indictment each time a defendant cannot remember because of delay. In that here, the touchstone of the due process inquiry is the safeguarding of the fact finding process at trial, the test must consider the nature of the trial itself. Where a defendant is unable to remember, but six witnesses have confirmed his criminal conduct, the fact finding process has adequate reliability to uphold the conviction. However, where petitioner MASSLER was disabled from remembering as a result of government delay and the only testimony against him was that of a heroin user and smuggler who had been given "informal immunity," the reliability of the fact finding process is undermined, and the indictment must be dismissed.

POINT III

THE COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR A HEARING TO DETERMINE WHETHER THE GOVERNMENT'S DELAY WAS A DELIBERATE TACTICAL MANEUVER, BECAUSE THE COURT ERRONEOUSLY ASSUMED THAT A SHOWING OF SUBSTANTIAL PREJUDICE AND DELIBERATE TACTICAL DELAY WAS A PREREQUISITE FOR A DUE PROCESS VIOLATION WHEN IN FACT DELIBERATE TACTICAL DELAY ALONE CAN BE SUFFICIENT.

Even if this Court should find that MR. MASSLER was not entitled to a dismissal of the action on the basis of his inability to remember events that occurred so long ago, the trial judge should, nevertheless, have ordered a hearing on the issue of whether there was deliberate prosecutorial delay for the purpose of gaining a tactical advantage over him. It is petitioner's contention that the *Marion* test is a disjunctive test; that in order for a defendant to prevail on a due process pre-indictment delay claim, he can prove either substantial prejudice or deliberate government delay in order to gain a tactical advantage.

Confusion exists as to how the *Marion* test is to be interpreted.

> Some question still remains whether the Supreme Court's comment in *Marion* was intended to establish a two part conjunctive test for due process relief from pre-indictment delay or simply a disjunctive list of alternative theories: (1) governmental misconduct in the form of tactical delay; or (2) substantial prejudice resulting from the lapse of time denying the defendant's right to a fair trial.

United States v. Barket, 530 F.2d 189 (8th Cir. 1976). Some courts have intimated that both elements must be satisfied for a defendant to prevail. *United States v. Reitscher*, 467 F.2d 269, 272 (10th Cir. 1972); *United States v. Washington*, 150 U.S. App. D.C. 68, 463 F.2d 904, 905 (D.C. Cir. 1975); *United States v. Daley*, 454 F.2d 505, 508 (1st Cir. 1972). Ordinarily courts recite the two elements without committing themselves on the issue. It has been unnecessary to decide the issue as the cases either involve no prejudice and no tactical delay, or prejudice and unreasonable delay. *United States v. Barket*, 530 F.2d 189, 195 (8th Cir. 1976).

Thus

> "there remains substantial doubt whether, in a case in which actual pre-accusation prejudice was overwhelming, the governments purposeful delay would have to be shown; or, alternatively, where the governments misconduct was blatant, whether the defendant would still bear the burden of showing actual prejudice."

United States v. Avalas, 541 F.2d 1100 fn. 9 (5th Cir. 1976).

The Supreme Court has never specifically endorsed the notion that the satisfaction of both of these requirements is a necessary prerequisite to a finding of a due process violation. In *Marion* the Court merely stated that the government conceded that if the defendants were able to satisfy both elements, then the defendants would have met their burdens. In *Lovasco*, the Government renewed that concession and expanded upon it by stating that:

> A due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecutor, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.

45 U.S.L.W. 4627, fn. 19 (June 9, 1977). In *Lovasco*, as in *Marion*, the Court did not squarely hold on the issue.

However, Justice Marshall's statement in *Lovasco*, implies that either alone could be sufficient. Justice Marshall states in the majority opinion:

> Thus *Marion* makes clear that proof of prejudice is *generally* a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused.

(emphasis added) Id. at 4629. Had the Court endorsed the conjunctive reading of the *Marion* standard the statement *would have read* as follows: Thus *Marion* makes clear that proof of prejudice is *always* a necessary but *generally* not sufficient element of due process, and that the due process inquiry must consider whether there was deliberate delay to gain a tactical advantage as well as prejudice. Justice Marshall's choice of words reveals the implicit endorsement of the disjunctive reading. This case provides the Court with an opportunity to make that endorsement explicit, an opportunity that the Court should utilize:

> We may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.

United States v. Russell, 411 U.S. 423, 432 (1973). When the government deliberately delays in order to gain a tactical advantage, when the government attempts to ensnare the defendant and impede his ability to defend himself, due process must bar the government from invoking the judicial process without requiring the defendant to prove that the trap worked.

On the basis of the three and one half years preindictment delay, coupled with the facts elicited at trial

that support the real possibility of tactical maneuvering, the Court should remand JEROLD MASSLER'S case for an evidentiary hearing.

CONCLUSION

For the foregoing reason, the writ should issue.

Dated: June 20, 1977

Respectfully submitted,

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By
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Appendix A—Judgment of the Fifth Circuit

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 76-2477

D.C. Docket No. 75-181-Cr-T-H

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PAUL RICE, PEDRO ALVAREZ, JOHN LESLIE WELLS, JR., and JEROLD MARTIN MASSLER,
Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

Before JONES, COLEMAN and TJOFLAT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 20, 1977

Issued as Mandate:

Appendix B—Opinion of the Fifth Circuit

UNITED STATES of America,
Plaintiff-Appellee,

v.

Paul RICE, Pedro Alvarez, John Leslie Wells, Jr., and Jerold Massler,
Defendants-Appellants.

No. 76-2477.

United States Court of Appeals,
Fifth Circuit.

April 20, 1977.

Defendants were convicted in the District Court for the Middle District of Florida, Wm. Terrell Hodges, J., of conspiracy to import, possess, and distribute marijuana and they appealed. The Court of Appeals, Coleman, Circuit Judge, held that defendants had not been denied due process by virtue of three and one-half-year delay between close of the alleged activities and the return of the indictment; that defendants' allegations as to what each of their codefendants would testify to if defendants were given separate trials were insufficient to entitle defendants to severances; that defendants were properly precluded from cross-examining Government's main witness, who was in protective custody, as to where he lived and worked; that statement written by witness prior to trial concerning events as to which he testified but omitting the name of one of the four defendants was properly admitted at the behest of the defendant who was not named therein; and that trial court did not err in refusing jury's request for transmittal to them of over 2,000 pages of transcript.

Affirmed.

1. Constitutional Law §265

One seeking to establish impermissible preindictment delay under the due process clause must show substantial actual prejudice resulting from the delay or that the delay was an intentional measure designed to gain a tactical advantage for the prosecution. U.S.C.A. Const. Amend. 14.

2. Criminal Law §573

Sixth Amendment right to speedy trial arises only when a defendant becomes an accused, either through arrest, indictment, or information. U.S.C.A. Const. Amend. 6.

3. Indictment and Information §7

Speculative assertions, such as allegations of lost witnesses, ensuing indigency, failure of memory, and general inability to defend oneself due to the delay fall short of showing impermissible preindictment delay. U.S.C.A.Const. Amend. 14.

4. Indictment and Information §7

Allegations that three and one-half-year delay between close of alleged criminal activities and return of indictment resulted in possible witnesses being either unremembered or unavailable and that the delay was intended to give the Government a tactical advantage over the defendants by enabling the Government to procure evidence of subsequent criminal acts of some defendants to bolster the prosecution of all were insufficient to show unconstitutional preindictment delay especially where no such later acquired evidence was offered against any defendant. U.S.C.A.Const. Amend. 14.

5. Criminal Law §622(3)

In order to obtain severance because of desire to call a codefendant as a witness on behalf of the defendant, the defendant must show bona fide need for the testimony, the

substance of the DeSired testimony, its exculpatory nature and effect, and that the designated codefendant will in fact testify at a separate trial.

6. Criminal Law §622(3)

When presented with motion for severance due to desire of defendant to call a codefendant at a separate trial, trial court must examine the significance of the alleged exculpatory testimony in relation to defendant's theory of defense, assess the extent to which the defendant might be prejudiced by the absence of the testimony, pay close attention to judicial administration and economy, and give weight to the timeliness of the motion.

7. Criminal Law §622(3)

Motion in which defendant asserted that, if severance were granted, codefendant would testify on defendant's behalf if called at a separate trial where he would not need to exercise a Fifth Amendment privilege and that codefendant would give evidence which would completely exonerate defendant did not state what the codefendant would testify to and was insufficient to entitle defendant to severance. Fed.Rules Crim.Proc. rule 14, 18 U.S.C.A.; U.S.C.A.Const. Amend. 5.

8. Criminal Law §622(2)

Defendant who asserted that he planned to call codefendant as his first witness if he were granted a severance, that he would prove that the codefendant was in jail at a particular time, which would contradict testimony of the prosecution's main witness, and that the codefendant would be willing to testify if he could no longer be prosecuted for the events alleged in the indictment was not entitled to severance as there was only a showing that the codefendant would testify on his own terms and there was no showing of unavailability of jail records to show that the codefendant had been in jail as alleged by defendant.

9. Criminal Law §622(2)

Defendant who stated that he wished to call codefendant as a witness and that the codefendant would testify that he was not acquainted with defendant any time during the conspiracy was not entitled to severance where the Government never claimed that the two codefendants had any contact.

10. Criminal Law §622(2)

Defendant who asserted that he desired to call codefendant to testify as to factual setting of two photographs which showed defendant and codefendant in an airplane and to testify that the pictures were taken at the time of a legitimate charter flight and not, as the prosecution contended, at the time of a flight bringing marijuana into the country was not entitled to severance.

11. Witnesses §268(1)

Although, generally, there is a right to inquire into a witness' background and environment in order to place the witness in his proper setting, there are limitations on that right.

12. Witnesses §268(1)

Trial court did not abuse its discretion in precluding defendants from cross-examining government witness, who was being held in protective custody, as to where the witness was working or living.

13. Criminal Law §369.2(1), 374

In order for evidence of other crimes to be admitted, the proof of the prior similar offense must be plain, clear and convincing, the offenses must not be too remote in time to the alleged crime, the element of the prior crime for which there is a recognized exception to the general rule, such as intent, must be a material issue in the case, and there must be substantial need for the probative value of the evidence. Federal Rules of Evidence, rule 404(b), 28 U.S.C.A.

14. Criminal Law §369.1

It was improper to admit testimony by Government's main witness that he had first become acquainted with one defendant at a time prior to the events giving rise to the indictment and that he had become acquainted with the defendant because they had both been involved in trading guns and dope as any need for evidence to establish the manner in which the witness and defendant had met could have been accomplished without mentioning the other crimes. Federal Rules of Evidence, rule 404(b), 28 U.S.C.A.

15. Criminal Law §1169.11

In view of overwhelming evidence of defendant's guilt, trial court's error in permitting witness to testify that he had first become acquainted with one defendant prior to the time of the transactions which gave rise to the indictment and that he had become acquainted with defendant because they were both engaged in trading guns and dope was harmless. Federal Rules of Evidence, rule 404(b), 28 U.S.C.A.

16. Witnesses §388(7)

Before handwritten summary prepared by witness concerning the events about which he was to testify was admissible, it was required to be shown that the statement was a prior inconsistent statement of the witness, the witness was required to be afforded an opportunity to explain or deny the statement, and the prosecution was required to be afforded an opportunity to interrogate the witness concerning the statement. Federal Rules of Evidence, rule 613(b), 28 U.S.C.A.

17. Witnesses §388(7)

Summary, handwritten by witness, of the events about which he had testified at trial which omitted any mention of one of four defendants was properly admitted at the behest

of that defendant after both the Government and the defendants were given the opportunity to confront the witness with the statement and to interrogate him concerning it. Federal Rules of Evidence, rule 613(b), 28 U.S.C.A.

18. Criminal Law §785(12)

Instruction which told the jury that the testimony of a witness could be discredited by showing that he previously made inconsistent statements and that evidence of earlier contradictory statements was admissible only to impeach the credibility of the witness and not to establish the truth of those statements was a sufficient limiting instruction with respect to introduction of a summary, written by Government's main witness prior to trial, of the events with respect to which he testified. Federal Rules of Evidence, rule 613(b), 28 U.S.C.A.

19. Criminal Law §622(2)

Three codefendants were not entitled to severance when the fourth defendant introduced at trial a summary, written by prosecution's main witness prior to trial, of the events as to which he testified at trial, which summary mentioned the three codefendants but not the defendant who offered the statement. Federal Rules of Evidence, rule 613(b), 28 U.S.C.A.

20. Criminal Law §666-1/2

Trial court did not err in refusing to compel government's main witness to answer questions asked by defense counsel during an interview where the Government had made the witness available for an interview and had told him that he could talk with defense counsel; defendants' right to access to prospective witness exists coequally with the witness' right to refuse to say anything.

21. Criminal Law §858(3)

Discretion of the trial court in ruling on jury request for transcripts of testimony is broad.

22. Criminal Law §858(3)

Trial court did not err in refusing jury's request for transmittal to them of over 2,000 pages of transcript.

Appeals from the United States District Court for the Middle District of Florida.

Before, JONES, COLEMAN and TJOFLAT, Circuit Judges.

COLEMAN, Circuit Judge.

Along with others, Alvarez, Wells, Rice and Massler were charged in a one count indictment with conspiracy to import, possess and distribute marijuana, 21 U.S.C. §§841(a)(1), 952(a). A twelve day trial resulted in a guilty verdict. Alvarez received a three year sentence, Wells one year, while Rice and Massler were sentenced to two and one-half years.

We affirm.

I. THE FACTS

The government's case depended, in the main, on the testimony of William Kilgore, an unindicted co-conspirator, in protective custody, who appeared under a grant of "informal" immunity.

Kilgore's Testimony

Kilgore first met Alvarez in 1968 or 1969. In February, 1972, Alvarez hired Kilgore to guard a cache of marijuana located at "Stash House No. 1" in Odessa, Florida. For three weeks Kilgore was paid to guard the contraband, to weigh it for customers, and collect for it. Alvarez told Kilgore that the marijuana, stored in bales and burlap sacks, came from Colombia, South America.

Later on in February Alvarez took Kilgore to Mike Sarga's "Stash House No. 2", in the same vicinity, where he did similar work.

In March, Kilgore and Alvarez flew to New York. After arrival Kilgore went with Allen Jacobs to Woodstock to guard a stash house located there. Sarga and Massler soon drove up in a van with a boat on top. The boat contained 350 pounds of marijuana. The next day Alvarez directed Kilgore to let Jacobs and Massler have 100 pounds each, on consignment. Later, Alvarez directed Sarga and Kilgore to transfer the remainder of the marijuana to Massler in Manhattan. Kilgore stayed in New York about a week and collected $120,000 from Jacobs and Massler, owed Alvarez for the pot. Kilgore than returned to Tampa and turned the money over to Alvarez.

Around the first of April, Alvarez contacted Kilgore again and asked him if he would like to go to Columbia and guard a return load of marijuana. Kilgore was also to pay the Colombian connection, Pedro and Alberto Davilla. He was to fly down on a DC-3, piloted by Wells and Rice and was to be paid $5000 for his part in the trip. Alvarez drove Kilgore to the Hawaiian Village Motel where Kilgore met Rice and Wells. Rice there stated that Alvarez had paid $10,000 to rent the plane for a prior trip and had then bought the plane for $10,000. Rice and Wells related to Kilgore an account of a prior similar trip to Colombia on which Alvarez had accompanied them. Alvarez had also told Kilgore of the prior trip, saying that the marijuana at "Stash House No. 1" had been obtained at that time.

The next day Kilgore, Rice and Wells flew to a location south of Bogata, Colombia. Once there, the defendants gave the Colombians the money and certain other items and loaded 3500 pounds of marijuana on the plane.

On return to the United States, they landed first at Lakeland, then returned to Zephyrhills. Once they landed, Alvarez and two others arrived in a Winnebago, into which they loaded the marijuana. From there, the party went to a house in Riverview and distributed part of the marijuana.

Subsequently, Alvarez again contacted Kilgore and asked him if he'd like to make a second trip to Colombia. A couple of weeks later, Alvarez approached Kilgore about making another trip to New York to collect money from Massler. Kilgore made this trip around the end of April, 1972, but returned to Tampa without the money. Massler followed a few days later and paid Alvarez in excess of $100,000.

Kilgore's testimony was supported by other items of evidence adduced by the government. Much of the conspiratorial activities had been recorded on film. One of the defendants had taken several hundred photos of the operation. Negatives of these photographs were volunteered to the law enforcement officers by the manager of the photography department at J.C. Penney's, who discovered the contents by chance.

The manager of the Hawaiian Village Motel corroborated Kilgore's account of the stay at that motel, although his testimony did differ in some aspects.

Lastly, one Porter reluctantly testified that Rice discussed with him the possibility of using one of Porter's airplanes for importing marijuana, that Rice leased a Douglas DC-3, and Wells had signed the agreement as a witness. He stated that sometime in April, 1972, he sold the craft to Rice and Wells. Porter once saw Rice and several other individuals unloading several dark, big, square parcels from the plane. He also saw a late night operation in April or May of 1972, in which a DC-3 landed, a vehicle approached the plane, there was activity around the plane, and the vehicle left. Additionally, Porter testified that Rice and Wells made inquiries of him as to how to arrange additional fuel sources for the DC-3.

This array of evidence, accepted by the jury as being true beyond a reasonable doubt, reduces the appellants to a many sided attack on various aspects of the trial.

II. APPELLATE CONTENTIONS

A. *Massler, Alvarez, Wells, and Rice*

1. *Pre-Indictment Delay*

There was a three and one-half year delay between the close of the alleged criminal activities and the return of the indictment. It is argued that this unconstitutionally prejudiced the defense and that by not holding an evidentiary hearing to determine the cause for the delay the District Court reversibly erred.

The defendants complained generally that due to the delay, possible witnesses were either "unremembered or unavailable", that the delay severely prejudiced the defense, and that it was intended to give the government a tactical advantage over the defendants, that is, to enable the government to procure evidence of subsequent criminal acts of *some* codefendants to bolster the prosecution of *all.*

No such later acquired evidence was ever offered against any of the defendants. No list of unavailable witnesses was tendered, nor was there any recitation of any exculpatory testimony thus put beyond the reach of the defense.

[1,2] The Supreme Court has held that the applicable statute of limitations is the primary, but not the sole, guarantee against the bringing of overly stale criminal charges; that one seeking to establish impermissible indictment delay under the Due Process Clause must show substantial actual prejudice resulting from the delay or that the delay was an intentional measure designed to gain a tactical advantage for the prosecution. Absent such a showing no Constitutional violation has been inflicted and the indictment need not be dismissed. See *United States v. Marion,* 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). The Sixth Amendment right to speedy trial arises only when a defendant becomes an accused, either throught arrest, indictment, or information. See *United*

States v. Marion, supra; United States v. Harrington, 5 Cir. 1976, 543 F.2d 1151; *United States v. Davis,* 5 Cir. 1973, 487 F.2d 112, 116, *cert. den.*, 1974, 415 U.S. 981, 94 S.Ct. 1573, 39 L.Ed.2d 878; *United States v. Broadway,* 5 Cir. 1973, 477 F.2d 991, 996.

[3] *Speculative assertions,* such as allegations of lost witnesses, ensuing indigency, failure of memory, and general inability to defend oneself due to the delay, fall short of the *Marion* standard, *United States v. Butts,* 5 Cir. 1975, 524 F.2d 975, 977; *United States v. McGough,* 5 Cir. 1975, 510 F.2d 598, 604; *United States v. Broadway,* 5 Cir. 1973, 477 F.2d 991.

[4] An evaluation of this appellate record in the light of the foregoing considerations shrinks the complaint about pre-indictment delay to nothing more than a complaint. There was no showing of actual prejudice. The contention fell so far short of *Marion* standards and our own decisions on the subject that it was without substance. The denial of an evidentiary hearing on the matter was not erroneous.

2. *Severance*

Various motions for severance were grounded on an expressed desire to call one co-defendant or another as a witness on behalf of the respective movants.

[5, 6] In our previous decisions we have clearly delineated what must be shown to warrant granting a motion to sever under the circumstances present here. The movant must demonstrate:

(1) bona fide need for the testimony;

(2) the substance of the desired testimony;

(3) its exculpatory nature and effect; and

(4) that the designated co-defendant will *in fact* testify at a separate trial.

United States v. Morrow, 5 Cir. 1976, 537 F.2d 120, 135; *United States v. Diez,* 5 Cir. 1975, 515 F.2d 892, 903, *cert.*

den. 423 U.S. 1052, 96 S.Ct. 780, 46 L.Ed.2d 641 (1976); *United States v. Burke,* 5 Cir. 1974, 495 F.2d 1226, 1234; *United States v. Martinez,* 5 Cir. 1973, 486 F.2d 15, 22; *Byrd v. Wainwright,* 5 Cir. 1970, 428 F.2d 1017, 1019-1022.

The trial court should

(1) examine the significance of the alleged exculpatory testimony in relation to the defendants' theory of defense;

(2) assess the extent to which the defendant might be prejudiced by the absence of the testimony;

(3) pay close attention to judicial administration and economy; and

(4) give weight to the timeliness of the motion.

Id.

[7] Massler moved pretrial for a severance predicated on Rule 14, Fed.R. Crim.P.[1] He asserted that while co-defendant Alvarez would not testify in his behalf at a joint trial he would do so if there was a severance. The motion stated:

> In the instant case, Pedro Alvarez has stated, and he will so depose if requested, that if called at a separate trial where he will not need to exercise a

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1. Rule 14 provides:

Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at trial.

> Fifth Amendment privilege, he will and can give evidence that will exonerate Jerrold Massler completely. If tried jointly, Mr. Alvarez will, of course, not testify.

This motion did not state what Alvarez would, in fact, testify to. Whatever the testimony, it was contingent upon Alvarez not being required to testify to anything which might tend to incriminate him.

The denial of the motion in this form was not error.

When trial day came Massler renewed his motion. Other defendants decided that they would attempt to board the same train. Alvarez indicated that he wanted to call Massler as a witness. Wells said that he desired to call one or more of the co-defendants as his witnesses.

[8] Alvarez told the Court that he planned to call Massler as his first witness. He stated that he would prove by Massler that Massler was in jail in the latter part of April, 1972, contradicting the testimony of Kilgore that he met Massler in Tampa in late April. If Massler was in jail in late April there should have been records to prove it without the necessity of calling Massler to the stand. Massler's attorney stated that his client would be willing to testify if "he could no longer be prosecuted for the events contained within this indictment", which amounted to nothing more than a suggestion that Massler would testify on his own terms, a grant of immunity from prosecution. The denial of Alvarez's motion was entirely in order.

Later in the trial, Massler's attorney told the Court that he wanted to call Alvarez as a witness. He stated that Alvarez would testify that he never received $200,000 from Massler as Kilgore testified, "and that he would exculpate my client in terms of this particular conspiracy". It was stated that Alvarez would not testify as a defendant but he would testify in a separate proceeding where his guilt or innocence was not on the line.

[9] During the same conference, Rice's attorney stated that he wanted to call Massler as a witness. He stated that Massler would testify that "he was not acquainted with my client during the period of time alleged in the conspiracy". Here it is to be noted that the government never claimed that Massler had any contact with Rice. Rice dealt with Alvarez.

[10] Wells' attorney informed the Court that he desired to call Alvarez to testify as to the factual setting for two photographs depicting Wells and Alvarez in an airplane. This testimony would have been that the picture depicted a legitimate charter flight on which Alvarez hired Wells to fly him to the Bahamas. Wells' attorney stated that "that would be all I would ask Mr. Alvarez concerning his relationship with Mr. Wells. I think it is highly probative." It was stated that Alvarez would testify in a proceeding where his guilt or innocence was not being determined.

Some of the motions were not made until the eleventh day of a twelve day trial.

For lack of any reasonable certainty that the proposed witnesses would, in fact, testify; for lack of relevance; for lack of the requisite exculpatory showing; and for lack of timeliness, we hold that the defendants were not prejudiced by the denial of the severally requested severances. The denials did not amount to reversible error.

3. *Cross Examination*

The appellants complain of being prohibited "from cross-examining Kilgore about his protected custody over a five month period and his activities during that time". The Court ruled:

> [N]o one shall seek to elicit from the witness that he is in protective custody as a result of any specific fear of harm at the hands of the defendant Alvarez
>
> . . .

****

> [T]he Court will direct counsel not to make inquiry as to the precise nature of the witness' present employment.

The Court specifically informed counsel, however, that they could inquire as to the fact that Kilgore was in protective custody, whether he was receiving payments from the government, whether he was gainfully employed, and what income he had. Counsel for Massler replied that he had no desire to find out where Kilgore was working or living.

[11] Although generally there is a right to inquire into a witness's background and environment in order to place the witness in his proper setting, *Alford v. United States*, 282 U.S. 687, 692, 51 S.Ct. 218, 75 L.Ed. 624 (1931), there are limitations. As *Alford* recognizes,

> There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.

Id. 282 U.S. at 694, 51 S.Ct. at 220.

In *Smith v. Illinois*, 390 U.S. 129, 133-134, 88 S.Ct. 748, 751, 19 L.Ed.2d 956 (1968), Mr. Justice White, concurring, stated that in addition to those exceptions noted in *Alford*, he "would place in the same category those inquiries which tend to endanger the personal safety of the witness". We have followed this exception. See *United States v. Alston*, 5 Cir. 1972, 460 F.2d 48, and *United States v. McKinley*, 5 Cir. 1974, 493 F.2d 547.

While maintaining a due regard for the constitutional right of confrontation, "the scope and extent of cross-examination is generally declared to be within the sound discretion of the trial court" and will not be interfered with absent an abuse of that discretion. *United States v. Brown*,

5 Cir. 1977, 546 F.2d 166, 169; *Grant v. United States*, 5 Cir. 1966, 368 F.2d 658, 661. Of course, when it is the "star" witness who is being cross-examined, or when he was "an accomplice or participant in the crime for which the defendant is being prosecuted, the importance of cross-examination is necessarily magnified". *United States v. Brown, supra*, 546 F.2d at 170; *Beaudine v. United States*, 5 Cir. 1966, 368 F.2d 417, 424.

[12] At an *in camera* conference the government informed the Court that any inquiry into the nature of Kilgore's work would readily reveal where he was working and would endanger him. We have no transcript of what occurred at the hearing but we have no difficulty in perceiving, viewing the record as a whole, that there was a reasonable necessity for not revealing where kilgore lived and worked when the case came to trial. That he was in protective custody was revealed.

The defendants also complain of being prohibited from asking Kilgore the circumstances surrounding his discharge from the military, certain aspects concerning an arrest for possession of heroin in 1973, and questions concerning trips by him to New York and to Miami.

We have looked carefully at the numerous evidentiary exceptions raised by appellants but the totality of the matter is that Kilgore was subjected for several days to rigorous cross examination, which developed many facts which might have discredited his testimony on direct. We conclude that there was no transgression of Sixth Amendment rights. See, in particular, *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

4. *Rule 404(b)*

Kilgore testified that he knew Alvarez and pointed him out in court. He said he first met Alvarez in 1968 or 1969.

The government admitted that it knew what the answer

was going to be when it thereafter asked Kilgore the following question:

> "Sir, what association, if any, did you have with Mr. Alvarez once you all met?"

There was an objection that any relationship prior to the inception of the conspiracy on January 1, 1972, was irrelevant and immaterial. Defense counsel pointed out that Kilgore "says he knows him". The objection was overruled on the ground that the jury would be instructed as to the time period charged in the indictment and that the relationship prior to that time "could be relevant with respect to the state of mind, or behaviour of the subject in explaining whatever he says explains subsequently of himself of the defendant".

Kilgore then responded, "We used to trade guns for dope and—".

The defense then moved for a mistrial.

There was a protracted conference in the absence of the jury. The government said that the proof was offered to show that this prior association was what prompted Alvarez to trust Kilgore with guarding the marijuana and collecting for it.

The prosecution further proffered that when Kilgore said "dope", he was refering to marijuana. The Judge asked Kilgore what he meant and Kilgore replied "marijuana and hashish". After this lengthy discussion, the Court determined that the statement was admissible under 404(b) of the Federal Rules of Evidence.

Once the jury returned, Kilgore testified what he meant by the word "dope". The Judge instructed the jury that Kilgore's statement should be considered *only with respect to Alvarez* and the statement should "receive only such weight as you may think it entitled to receive in relation to all of the other testimony and evidence" adduced at trial.

Rule 404(b) provides:

> *Other crimes, wrongs, or acts.*
>
> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[13] We have recently analyzed this rule in *United States v. Bloom*, 5 Cir. 1976, 538 F.2d 704. Noting that it coincides with existing case law in this Circuit, *Id.* at 708, we stated that, "evidence of acts extrinsic to the crime charged is admissible under the itemized exceptions once the trial court is satisfied that certain threshold prerequisites have been met". *Id.* at 708. These prerequisites are:

> (1). Proof of the prior *similar* offenses must be "plain, clear and convincing";
>
> (2). The offenses must not be too remote in time to the alleged crime;
>
> (3). The element of the prior crime for which there is a recognized exception to the general rule, such as intent, must be a material issue in the instant case;
>
> (4). There must be a substantial need for the probative value of the evidence provided for by the prior crimes.
>
> *Id.* at 708 (emphasis in original).

[14] Without commenting on the first three criteria, we feel it is clear that the disputed statement fails to pass criterion number four. There was *no* need for the evidence in the form rendered. Kilgore had stated that he had known Alvarez since 1968 or 1969 and had pointed him out in court. Any need for evidence to establish the manner in

which Kilgore and Alvarez met could have been accomplished without mentioning "trading guns". The government's deliberate interjection of this testimony exhibits lack of the appropriate sensitivity to the defendants' substantive rights. We expressly disapprove it.

[15] Nevertheless, we are convinced that the error was harmless beyond a reasonable doubt. The evidence of defendants' guilt was abundant; the trial lasted twelve days; fourteen witnesses were heard. We are persuaded, therefore, that this one statement in such a massive trial could not have possibly influenced the jury to reach an improper verdict.

In *United States v. Resnick*, 5 Cir. 1974, 488 F.2d 1165, *cert. den.*, 416 U.S. 991, 94 S.Ct. 2400, 40 L.Ed.2d 769, the defendant was charged with selling firearms to nonresidents and failing to keep appropriate firearms transaction records. An A.T.F. agent testified to certain unrelated criminal activity, namely that the defendant dealt in stolen guns and participated in the unlawful alteration of semi-automatic weapons to fully automatic ones. Defense counsel moved for a mistrial, which was denied. The trial court stated that it would instruct the jury to disregard the tainted testimony. The District Court, however, did not give the promised curative instructions. Further, at the post-instruction conference, defendant's attorney stated that he had no objections to the charges given.

In holding that the error was harmless, we said:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand. . . ."

Kotteakos v. United States, 1946, 328 U.S. 750, 764, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557; F.R.Crim.P. 52(a). In the

circumstances of this case, we are convinced that the substantial rights of Resnick were not affected.

> "[W]e have carefully canvassed the entire record and transcript, and are convinced that no prejudice resulted in any wise affecting the verdict of the jury. The evidence of defendant's guilt is strong, clear and convincing beyond question."

Id. at 1168.

See also United States v. Beasley, 5 Cir. 1977, 545 F.2d 403; *United States v. Bloom*, *supra*; *United States v. Barnett*, 5 Cir. 1974, 492 F.2d 790; *United States v. Harbolt*, 5 Cir. 1974, 491 F.2d 78; *United States v. Roland*, 5 Cir. 1971, 449 F.2d 1281.

As in *Resnick*, *supra*, the District Court herein specifically asked counsel for Alvarez if he desired an instruction relating to the disputed statement, stating that it would be willing to give a limiting instruction if one was requested. Counsel for Alvarez declined the offer.

In view of the instructions as to the other defendants given at the time the statement was admitted, it was not error to deny a mistrial as to them. *United States v. Davis*, 5 Cir. 1977, 546 F.2d 617, 620.

III. ALVAREZ, WELLS, AND RICE

1. *Massler's Exhibit No. One*

While Kilgore was being cross-examined, the government turned over to the defendants a hand-written statement, prepared by Kilgore at an undetermined date, which was a summary of the events to which he had testified. The statement related various aspects of the conspiratorial operations, Massler's name did not appear in the account but the names of the other defendants were included.

Alvarez had the exhibit marked for identfication and cross-examined Kilgore about it, as did Massler's attorney.

Several days later, Massler informed the Court that he intended to offer Kilgore's written statement into evidence as exculpating Massler by failure to mention his name. The Court reserved its ruling. After several discussions about the admissibility of the exhibit, the government withdrew its objections and the statement was admitted, albeit over the objections of the remaining defendants.

Three questions were raised by these defendants with regard to the admission of this evidence:

(A) Whether, in fact, it was admissible;

(B) Whether the Court erred in not giving instructions to the jury as to its use, limitations, and significance; and

(C) Whether the Court erred in denying Alvarez's, Wells', and Rice's motions for severance after the document was admitted.

In admitting "Massler's Exhibit No. One", the Court stated that it was allowing it in under 613(b) Fed.R.Evid. because of its inconsistency with portions of Kilgore's testimony, because Kilgore had been cross-examined at length concerning the exhibit, and because the government objections to its introductions had been withdrawn.

Rule 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

[16, 17] This rule establishes three criteria which must be met before the statement is admissible:

(1) It must be a prior inconsistent statement of the witness;

(2) The witness must be afforded an opportunity to explain or deny the statement; and

(3) The opposing party must be afforded an opportunity to interrogate the witness concerning the statement.

All three elements are present here.

[18] Defendants complain that no limiting instruction was given and, that under our previous decisions, this was error. *See United States v. Sisto*, 5 Cir. 1976, 534 F.2d 616; *United States v. Garcia*, 5 Cir. 1976, 530 F.2d 650; *Slade v. United States*, 5 Cir. 1959, 267 F.2d 834.

The fact is that a limiting instruction *was* given. The Court told the jury:

> The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. *The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of these statements.* (Emphasis added.)

The Court then instructed the jury on the effect of impeachment through such statements.

[19] Denying the severance requested by the other defendants was not error. *United States v. Maddox*, 5 Cir. 1974, 492 F.2d 104, 108, *cert. den.* 419 U.S. 851, 95 S.Ct. 92, 42 L.E. 2d 82 (1974); *United States v. Johnson*, 5 Cir. 1973, 478 F.2d 1129, 1131, n.3; *United States v. Harris*, 5 Cir. 1972, 458 F.2d 670, 673, *cert. den.* 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972); *United States v. Levrie*, 5 Cir. 1971, 445 F.2d 429, 431; *James v. United States*, 5 Cir. 1969, 416 F.2d 467, 475.

2. *Witness Interview*

[20] The defendants urge that the District Court erred by refusing to compel Kilgore to submit to an interview by

defense counsel. As the result of a motion by the defendants, the government made Kilgore available to the defendants for an interview. Kilgore, however, refused to answer any questions about the case. Both before and during trial, the District Court interviewed Kilgore concerning his refusal to talk with defense counsel. There is no indication that the government was responsible for Kilgore's attitude. To the contrary, Kilgore told the Court that the government had told him that he could talk to defense counsel and that the matter was strictly up to him. All that a defendant is entitled to is *access* to a prospective witness. This right, however, exists co-equally with the witnesses' right to refuse to say anything. *United States v. Dryden*, 5 Cir. 1970, 423 F.2d 1175, 1177, *cert. den.* 398 U.S. 950, 90 S.Ct. 1869, 26 L.Ed.2d 290 (1970). "A government witness who does not wish to speak to or be interviewed by the defense prior to trial may not be required to do so." *United States v. Benson*, 5 Cir. 1974, 495 F.2d 475, 479.

IV. MASSLER

Inquiry by Jury

After one hour of deliberation, the jury sent the Court a written message requesting "all transcripts now available in written form". The Court discussed how it planned to handle the request and there was no objection. The jurors were called back and the Court advised them:

> Now if you do have, or if you should have during your deliberation some particular or narrow question, so-to-speak with respect to an item, or items of testimony you, of course, may request it in a written message . . . and I will give consideration to that. . . . But, in all events, a broad request such as you have made here for all available transcripts cannot be granted by me under prevailing policy and rules, and I trust you will understand that.

No objections were made at this time either.

[21] The discretion of the trial judge in ruling on jury requests of this nature is broad, *see, e.g., Government of the Canal Zone v. Scott*, 5 Cir. 1974, 502 F.2d 566; *United States v. Braxton*, 5 Cir. 1969, 417 F.2d 878; *Pinckney v. United States*, 5 Cir. 1965, 352 F.2d 69.

In *United States v. Morrow*, 5 Cir. 1976, 537 F.2d 120, 148, we held that the trial court did not abuse its discretion in denying the jury's request for over 300 pages of transcript. We stated: "The possibility of undue emphasis by the jury on a small part of the testimony given in the six week trial of this case amply justified the district court's denial of the jury request." *Id.* at 148.

[22] The jury's request herein could conceivably have meant the transmittal to them of over 2000 pages of transcript. There was no abuse in denying that request.

V. OTHER ASSERTED ERRORS

In addition to the Points hereinabove discussed, the appellants claim errors as to alleged *Bruton* rights, that they were prosecuted for a multiple conspiracy, that they were improperly denied an opportunity to take the deposition of two Colombian nationals in Colombia, that they were erroneously denied an opportunity to attack the reliability of certain photographic evidence, that the evidence was insufficient to support Rice's conviction, that the trial judge displayed improper irritation with the witness Porter, and that the jury was not fully instructed as to the testimony of accomplices. They also complain of the differences in the sentences imposed on the several defendants.

A searching evaluation of these contentions reveals their lack of merit. We see no benefit to be had by unnecessarily prolonging this opinion with an extended discussion of these matters.

CONCLUSION

The record in this appeal reveals that the appellants were bereft of a defense on the facts. Accordingly, defense counsel retreated to the only hope left—an able, ingenious, persistent attack on trial procedures. They are to be complimented for their efforts, but the convictions must stand unreversed.

AFFIRMED.

Appendix C—Pre-Trial Decision U.S. District Court Middle District of Florida

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

PEDRO ALVAREZ, et al.

No. 75-181-Cr-T-H

ORDER

Defendants Rice and Massler have moved to dismiss the indictment on two grounds: (1) the delay of approximately three and one-half years between the offense alleged and the return of the indictment violates their Fifth Amendment right to due process of law; and (2) the attorney who presented evidence to the Grand Jury was not properly empowered to conduct Grand Jury proceedings.

Where, as here, the delay occurs prior to the time that the Defendant is indicted, the statute of limitations is the primary guarantee against the prosecution of overly stale criminal charges (*United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455 (1971); *United States v. Butts*, 524 F.2d 975, 977 (5th Cir. 1975)); and further protection of Defendant's rights comes from the Due Process clause of the Fifth Amendment, not the Speedy Trial Guarantee of the Sixth Amendment. (*United States v. Marion, supra; United States v. McGough*, 510 F.2d 598, 604 (5th Cir. 1975). With respect to the showing required to bar a prosecution on due process grounds because of delay, the test in this

Circuit is both stringent and clear: a defendant must show (1) that he suffered "actual prejudice and not merely 'the real possibility of prejudice inherent in any extended delay' " (*United States v. McGough, supra,* at 604; *see also United States v. Butts, supra,* at 977), as well as (2) "that the delay was an intentional measure to gain a tactical advantage." (*United States v. Butts, supra,* at 977).

Since the indictment was returned within the applicable limitations period (*see* 18 U.S.C. §3282), Defendants are reduced to the due process claim. In order to meet the first requirement, Defendant Rice cites seizure of records by the Government and that delay has "deprived him of his ability to produce alibi witnesses or otherwise adequately defend himself," while Defendant Massler adds fading memory. Defendant Rice's first claim is covered by *Brady v. Maryland,* 373 U.S. 83 (1963), and thus unavailing in this context. With respect to the other claims, "a general allegation of loss of witnesses and failure of memories is insufficient to establish prejudice." (*United States v. McGough,* 510 F.2d 598, 604 (5th Cir. 1975), *quoting United States v. Zane,* 489 F.2d 269, 270 (5th Cir. 1973)). Moreover, Defendants' conclusion that the delay must have been caused by a desire to gain a tactical advantage, drawn from the fact of the delay (and certain events) is insufficient to establish that "the delay was an intentional measure to gain a tactical advantage." This case is controlled by *United States v. Marion,* 404 U.S. 307, 92 S.Ct. 455, wherein the Supreme Court found no due process violation in a 38 month delay, and *United States v. McGough,* 510 F.2d 598 (5th Cir. 1975), wherein the Fifth Circuit rejected a due process claim founded upon a more concrete showing of actual prejudice than is made here. Accordingly, the motion is DENIED.